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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 CHRISTOPHER MILLER,

11 Plaintiff,

12 v.

13 MARGARET GILBERT, et al.,

14 Defendants.

CASE NO. 3:16-cv-05891-BHS-JRC

ORDER DENYING MOTION TO
STRIKE

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16 The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States
17 Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local
18 Magistrate Judge Rules MJR1, MJR3, and MJR4.

19 Plaintiff has filed a motion to strike the supplemental declaration of non-party Sara
20 Smith. Dkt. 71. Plaintiff contends that the declaration was not filed in a timely manner and that it
21 improperly relies largely on third-party speculation. *Id.* Defendants reply that the declaration was
22 indeed filed on October 26, 2017, after the October 23, 2017 deadline. Dkt. 72. However,
23 defendants state that this was because the declarant was unavailable before the deadline and
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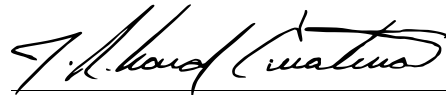
1 defendants felt it necessary to allow her to directly respond to plaintiff's allegations in his motion
2 for contempt (Dkt. 68). Dkt. 72. They request the Court retroactively extend the deadline. *Id.*
3 Plaintiff filed a reply. Dkt. 74.

4 When an act must be done within a certain time, the Court may extend that time if a
5 motion is filed before the deadline, or if a motion is filed after the deadline and the party failed to
6 act "because of excusable neglect." Fed. R. Civ. P. 6 (b)(1). In addition, at the summary
7 judgment stage, the Court does not look at the admissibility of the form of evidence, but whether
8 it could be presented in an admissible form. *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir.
9 2003). Here, plaintiff's motion should be denied. Defendants state that they attempted to contact
10 non-party Smith before the deadline, but were unable. They further argued that her testimony is
11 necessary because plaintiff had accused her of perjury and was asking the Court to hold her in
12 contempt. As defendants note, they filed the declaration three days after the deadline and the late
13 filing does not appear to have prejudiced plaintiff. Therefore, the Court finds that this was
14 excusable neglect and it is appropriate to retroactively extend defendants' deadline.

15 Further, non-party Smith's testimony is not inappropriate. The Court may consider
16 testimony presented in an inadmissible form if it would be admissible at trial. Plaintiff argues
17 non-party Smith's testimony is speculative, based on a doctor's opinion who never examined
18 plaintiff. Dkt. 71 at 2. However, both her testimony and the doctor's opinion she relies on are
19 based on plaintiff's medical record and x-rays contained in that record. Her testimony is
20 therefore based on admissible evidence and is not speculative. Because of this, the Court accepts
21 non-party Smith's supplemental declaration and will consider it with the rest of the record.

1 The Court denies plaintiff's motion to strike (Dkt. 71). Defendants' deadline to file their
2 response (Dkt.66) to plaintiff's motion for contempt (Dkt. 59) is retroactively extended to
3 October 26, 2017.

4 Dated this 11th day of December, 2017.

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7 J. Richard Creatura
8 United States Magistrate Judge
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